Supreme Court, U.S.
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Case No. _____

SUPREME COURT OF THE UNITED STATES

October 1994 Term

ROSS HUEBNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the United States of America

PETITION FOR WRIT OF CERTIORARI

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90pp

I.

QUESTION PRESENTED FOR REVIEW

Is the filing of a bankruptcy petition to lift an Internal Revenue Service wage levy an act of attempt income tax evasion under 26 U.S.C. § 7201?

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III.

REFERENCE TO THE OFFICIAL REPORTS OF OPINIONS.

1. ***U.S. vs. Huebner***, 16 F.3d 348 (9th Cir. 1994) (filed Feb. withdrawn Dec. 16, 1994).
2. ***U.S. vs. Huebner***, 48 F.3d 376 (9th Cir. 1994) (filed Dec. 16, 1994).

IV.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A.

The Date of Judgment Sought to be Reviewed

The United States Court of Appeals for the Ninth Circuit Order and Opinion rendered on December 16, 1994. (See Appendix; P. A-2, 9th Cir's 2nd decision; 48 F.3d 376).

B.

Date of Order Denying Rehearing

The United States Court of Appeals for the 9th Circuit on March 15, 1995 denied the Rehearing of Petitioner Huebner. (See Appendix; A-1, (unpublished) Order denying Rehearing).

C.

Statutory Provision Conferring Jurisdiction On This Court to Review the Judgment by Writ of Certiorari.

28 U.S.C. §1257 provides:

State courts; appeal; certiorari.
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

V.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

At issue in this proceeding are:

1. United States Constitution, Fifth

Amendment, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. **18 USC §2 provides:**

§2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever, willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

2. **18 USC §371 provides:**

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more

than five years, or both.
If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. **26 USC §7201 provides:**
§7201. Attempt to evade or defeat tax.
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100.000 ($500,000 in the case of a corporation), or imprisonment not more than 5 years, or both, together with the costs of prosecution.

4. **11 USC §362(a)(1) provides:**
§362(a). Automatic stay.
(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3), operates as a stay, applicable to all entities, of--
(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to

recover a claim against the debtor that arose before the commencement of the case under this title;

. . .

5. **18 USC §152 provides:**

§152. Concealment of assets; false oaths and claims; bribery.

A person who--

(1) Knowingly and fraudulently conceals from a custodian, trustee, marshall, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) Knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) Knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) Knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) Knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) Knowingly and fraudulently gives, offers, receives, or attempts

to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forebearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) After the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined not more than $5,000, imprisoned not more than 5 years, or both.

VI.

STATEMENT OF THE CASE

The issue presented in this case is one of

first impression in the United States - "Is an individual guilty of income tax evasion (26 USC §7201) when he files bankruptcy to lift a wage levy imposed by the IRS [the effect being to delay or postpone the IRS collection process because of the automatic stay, [11 USC §362(9)], to collect money for taxes due and owing? Case law and common sense says "No".

Several individuals had tax liability assessed by the Internal Revenue Service [IRS] and subsequently had their wages garnished by IRS tax levies. These individuals were advised to file federal bankruptcy and did so with the assistance of the Petitioner, ROSS HUEBNER, hereinafter "Ross" and others. The Automatic stay under bankruptcy law [11 USC §362(a)] provided immediate and temporary relief from the IRS wage garnishments. The bankruptcy filings in no way hide, concealed or destroyed the tax liability owed to the Government. The only effect was to delay or postpone the IRS collection process because of the automatic

stay provision. This relief is provided against all creditors including the IRS and is the core of the entire bankruptcy law. However, the Government treated the effect of the automatic stay as income tax evasion under **26 USC §7201**. Its position is setforth in the Indictment.

> These petitions had the effect of immediately stopping all collection activity by the IRS and, <u>therefore evading and defeating the payment of income taxes owed to the United States of America</u>.[1]

Ross was convicted of one count of conspiracy (**18 USC §371**) and twelve counts of aiding and abetting (**18 USC §2**) based on the substantive violation of income tax evasion (**26 USC §7201**).

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[1] The persons assisting the bankruptcy filers incorrectly believed that an individual had to be insolvent (in the sense that their monthly expenditures had to exceed their monthly income) in order to be eligible for bankruptcy. Each filer signed a promissory note and the debt was listed in the petition. Such conduct at best is bankruptcy fraud under (18 USC §152) not income tax evasion. It is now conceded that the promissory note had no effect on the bankruptcy filing and the triggering of the automatic stay.

All charges against Ross were based upon the false premise setforth by the Government that the automatic stay of collection under bankruptcy law amounts to "income tax evasion". This case is of major significance for those individuals who file bankruptcy when the IRS is a creditor and any person who helped or assisted the filer, such as an attorney, accountant or mere friend or family member. Ross now seeks relief in this Court by a Petition for Writ of Certiorari. The United States Court of Appeals for the Ninth Circuit had jurisdiction of Petitioner's original appeal in accordance with **FRAP 3(a)** and **FRAP 4(b)**.

VII.

LAW & ARGUMENT

THE FILING OF A BANKRUPTCY PETITION WITH THE RESULT OF LIFTING AN IRS LEVY IS NOT AN "EVASION" OR "DEFEAT" OF INCOME TAX UNDER 26 U.S.C. §7201.

INTRODUCTION

On May 29, 1991, an indictment was filed

containing fifty-three counts wherein eight persons were named as defendants, the charges consisting of Conspiracy, 18 U.S.C. §371; Bankruptcy Fraud, 18 U.S.C. §152; Attempt to Evade or Defeat Payment of Income Tax, 26 U.S.C. §7201 and; Aiding and Abetting, 18 U.S.C. §2. "Ross" was found guilty of one count of Conspiracy and twelve counts of Aiding and Abetting. Relative to the tax counts, the Government, in substance, charges that "Ross" aided and abetted other individuals to evade and defeat income taxes due and owing the United States of America by filing bankruptcy petitions falsely listing Constitutional Sulphur as a creditor. It is indis-putable that the Government's entire case relative to all counts is predicated upon a promissory note of Constitutional Sulphur executed by various named defendants and others.

According to the Government, the goal of the defendants was to evade and defeat the payment of income taxes. The Government

alleges this goal was achieved:

> "* * * by filing or causing to be filed false bankruptcy petitions with the United States Bankruptcy Court in the District of Nevada. These petitions had the effect of immediately stopping all collection activity by the IRS and, therefore, evading and defeating the payment of income taxes owed to the United States of America." (emphasis added) See Criminal Indictment, Count One, P. 4; Goal of the Conspiracy.

It is evident that it was the filing of the bankruptcy petition which interrupted the IRS collection efforts, thereby constituting the alleged crime. However, the causal relation between the Constitutional Sulphur note and the harm experienced by the IRS is fatally absent. The Government contends that the IRS was injured by having its tax collection efforts stayed. This is a legal phenomenon routinely experienced by all major creditors on a daily basis, that is to say, debtors in massive numbers file bankruptcy petitions. In terms of bankruptcy, IRS is a major creditor. It is conceded that the primary object in filing the bankruptcy

petitions was to obtain a respite from IRS wage levies which various defendants were experiencing. This is a legitimate object under the Bankruptcy Code.

DISCUSSION

I. Causal Relation Is Required Between An Accused's Act And The Resulting Harm.

The tax violations are inapposite within the factual context of this case. This diverted the investigative focus from an otherwise routine bankruptcy fraud investigation to a tax fraud investigation. Specifically, the difficulty with the §7201 violations derives from the Government's having cast the indictment in terms of a tax case. It is not. It is a bankruptcy case. The bankruptcy charges are clear and precise in terms of the law and the facts. When the tax evasion counts are analyzed, that precision is no longer apparent. The Government attempts to turn lawful conduct into a crime, the filing of a bankruptcy petition. When a false statement is made to a bankruptcy court, it is evident

that that statement may directly impact upon the court's disposition of the case. Conversely, that same false statement has no impact upon the IRS. The injury experienced by the IRS, to repeat, was that the collection efforts of IRS were stayed. The bankruptcy petitions, irrespective of whether or not it contained the Constitutional Sulphur note obligation, would have stayed the IRS collection efforts.

According to Professor Beale, causal relationship between one's act and a harm should be analyzed as follows:

> "Starting with a human act, we must next find a causal relation between the act and the harmful result; for in our law--and, it is believed, in any civilized law--liability cannot be imputed to a man unless it is in some degree a result of his act. Imposition of liability, even that which seems most extreme, is yet based upon a causation by the defendant's act."

Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 632, 637 (1920), cited in 1 Clark & Marshall, *A Treatise on the Law of Crimes*,

7th ed., 1967, §4.01, pp. 208-209.

It was the filing of the bankruptcy petition which stayed further collection efforts by IRS. It was not the listing the Constitutional Sulphur note on the petition which stayed those collection procedures. Hence, there is a lack of causal relationship between the Constitutional Sulphur note and the impeding of the collection procedures; in that, the various individuals involved were qualified to file the bankruptcy petitions irrespective of whether they were obligated by the terms of the Constitutional Sulphur note.

II. **The Automatic Stay Provision Under §362 of the Code Applies with Equal Force to IRS Tax Collection Activity.**

When a bankruptcy petition is filed, the automatic stay provision of **11 U.S.C. §362** is triggered, prohibiting any future collection against the debtor.[2] Thus, no further

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[2] Acts which are stayed by the commencement of a bankruptcy case are described by 11 U.S.C. §362, the automatic stay provision of the Bankruptcy Code. Those acts include any

collection action may be taken by a creditor, including the IRS, unless the creditor moves the court and receives relief from the automatic stay. The full force of the automatic stay commences, by operation of law, at the time of the filing of the bankruptcy petition. It was the automatic stay that prohibited the IRS from pursuing collection of the taxes. The relevant inquiry here is not whether the petition was false but whether the individuals were eligible to file a petition.

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act to collect, assess, or recover a claim against the debtor, which arose before the commencement of the bankruptcy case. The legislative history reflects the purpose of the automatic stay as follows:

> "The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy."

See, 11 U.S.C.S. §362 (1989), Ancillary laws and Directives, Legislative History.

III. The Constitutional Sulphur Note Was Not Needed To Be Eligible To File The Bankruptcy Petitions.

The indictment alleged that it was a necessary condition precedent to list Constitutional Sulphur as a debt to be eligible to file the bankruptcy petitions. This is false and subsequently admitted by the Government after reading and researching defense pretrial motions. All the individuals who filed a bankruptcy petition were residents of the United States. Therefore, each were eligible to file a Chapter 7 or 11 bankruptcy petition, and thus legally entitled to the benefits of the automatic stay. Case law has clearly established that additional restrictions or limitations are not a requirement of filing a voluntary petition. In fact, a person who does not owe any debts or is clearly solvent is eligible to file a bankruptcy petition because owing debts, suffering from financial harassment, or being

insolvent are not requirements for filing a bankruptcy petition. ***In re Bradford Laundry Co.***, 50 F.Supp. 361 (W.D. Pa. 1942); ***In re Harriman***, 31 F.Supp. 50 (E.D. Pa. 1979). Nor does solvency of a debtor in chapter 7 case render the petition invalid. ***In Re Beck Rumbaugh***, 49 B.R. 920 (E.D. Pa. 1985). ***See*** also, ***Peoples Nat'l Bank of Plymouth, Ohio v. Foltz***, 25 F.2d 295, 296 (6th Cir. 1928), indicating that a voluntary bankruptcy carries no inference of insolvency. Furthermore, the official form for voluntary petitions does not require an allegation of insolvency. ***See*** *Bakr. Form No. 1.*

Additionally, there is no requirement that a debtor own property or owe dischargeable debts. ***Blackstock v. Blackstock***, 265 F. 249, 45 Am. Bankr. Rep. 192 (8th Cir. 1920). A person can file a voluntary petition even if not entitled to a discharge (e.g., because of a previous discharge in six years). A person who is already the subject of an insolvency-

type proceeding in a state court can file, even if that person is the subject of an involuntary petition. ***In re Prudence Co.***, 79 F.2d 77 (2nd Cir. 1935); ***cert. denied***, 296 U.S. 646 (1935); ***International Silver Co. v. New York Jewelry Co.***, 233 F.945 (6th Cir. 1916); ***Engleman v. Commodity Credit Corp.***, 107 F.Supp. 930 (S.D. Cal. 1952); ***In re Bradford***, supra; ***In re Denton and Haskins Music Publishing Co.***, 10 F.Supp. 802 (S.D. N.Y. 1935). In these cases, the Bankruptcy Court had broad power to abstain temporarily or permanently, but this power did not prevent an initial filing. **11 U.S.C. §305**. Cf. ***International Shoe Co. v. Smith-Cole Co.***, 62 F.2d 972 (10th Cir. 1933). Finally, it is well settled that there is no requirement of "good faith" for filing; it is a ground for the court to ascertain rather than a condition of filing. ***Porterfield v. Gerstel***, 222 F.2d 137 (5th Cir. 1955); ***Zeitinger v. Hargadine-McKittrick Dry Goods Co.***, 244 F.719 (8th Cir. 1917). The Government admitted at the

commencement of trial that the Constitutional Sulphur note was not needed to be eligible to file a bankruptcy petition.

> "Freeman was under the mistaken impression that the defendants had to be insolvent (in the sense that their monthly expenditure had to exceed their monthly income) in order to be eligible for bankruptcy." *See* Government's Trial Memorandum, p. 3, footnote 2.

Even the three judge panel on appeal recognized this important fact, but ignored its significance.

> "The Bankruptcy Act does not require any particular degree of financial distress as a condition precedent to a petition [sic] seeking relief." *U.S. v. Huebner*, 48 F.3d 376, at 379.

Again, since the various named defendants and other persons filing the bankruptcy petitions were eligible to do so, the automatic stay was triggered. It was the automatic stay which stopped the IRS collection activity not the alleged Constitutional Sulphur note.

IV. <u>The Bankruptcy Petitions Did Nothing More Than Delay or Postpone the Collection of Taxes</u>.

It is well known in law and established

repeatedly at trial that the lifting of a levy in bankruptcy does nothing more than delay or postpone the collection of debt, including IRS taxes. A mere delay or postponement in payment of taxes is not income tax evasion under **26 U.S.C. § 7201**. ***Edwards v. U.S.***, 375 F.2d 862 (9th Cir. 1967). The three judge panel correctly applied ***Edwards*** in its first ***U.S. v. Huebner*** decision but went astray in the substituted decision. "The distinguishing factor is that in ***Edwards***, there was insufficient evidence of any willfulness to evade payment." ***U.S. v. Huebner***, 48 F.3d, at P. 379. To consider tax motive is error. ***Knetch v. U.S.***, supra. Motive, even a "bad" motive, is irrelevant here since the statute (the automatic stay provision) did what it was intended to do, i.e., stop all collection activity.

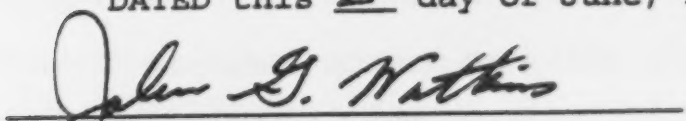
VIII.

CONCLUSION

For the above-cited reasons, this Court

should grant certiorari in this case to consider the issue on the merits.

DATED this 2nd day of June, 1995.



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CERTIFICATE OF SERVICE BY MAIL

ROSS HUEBNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATE OF NEVADA)
: SS
COUNTY OF CLARK)

The undersigned hereby certifies and affirms that I am an employee of the law office of JOHN G. WATKINS, ESQ., attorney for the Petitioner in the above-entitled matter, and a person of such age and discretion as to be competent to serve papers.

That on June 3rd, 1995, I served a copy of the foregoing and attached PETITION FOR WRIT OF CERTIORARI be depositing same in an enclosed envelope, first-class postage fully prepaid in the United States Mail, addressed as follows:

. . .

. . .

. . .

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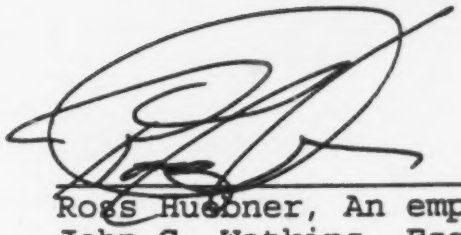

Ross Huebner, An employee of
John G. Watkins, Esq.

CERTIFICATE OF MAILING BY COUNSEL FOR PETITIONER

ROSS HUEBNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States, Counsel for Petitioner herein, a member of the Bar of this Court, Certifies that to his knowledge the Petitioner for Writ of Certiorari was mailed to this Court on the 3rd day of June, 1995, within the permitted time to file said Petition,

. . .

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. . .

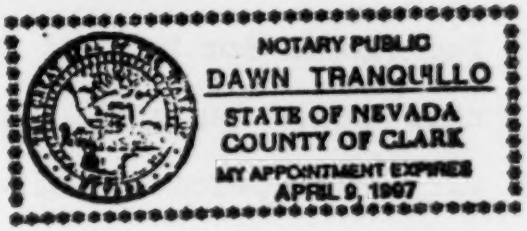
and that copies of the same were, on that date mailed to the Department of Justice, United States Attorney's Office, both the Southern Nevada and the Washington, D.C Offices.

Dated this 3rd day of June, 1995.

JOHN G. WATKINS, ESQ.

SUBSCRIBED AND SWORN to be fore me this 3rd day of June, 1995.

Notary in and for Said Clark County and the State of Nevada.



No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROSS HUEBNER,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari To The Supreme Court of the United States

---

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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a. Order denying rehearing [03-15-95]

(unpublished) A-01

b. Opinion and Order [12-16-94]

(published) A-03

c. Opinion [02-10-94]

(published & withdrawn) A-34

i. **Order of the United States Court of Appeals.** (Unpublished)

a. Order Denying Rehearing En Banc.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 92-10543
	)	D.C.Cr-91-00120-PMP
Plaintiff-Apppellee,	)	
	)	
v.	)	ORDER
	)	
ROSS HUEBNER,	)	
	)	
Defendant-Appellant.	)	

Before: FAIRCHILD,* BEEZER, and WIGGINS, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judges Beezer and Wiggins vote to reject the suggestion for rehearing en banc and Judge Fairchild so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge

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* Honorable Thomas E. Fairchild, Senior Circuit Jude, Seventh Circuit, sitting by designation.

in active service has requested a vote to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

i. Opinion and Order of the United States Court of Appeals for the Ninth Circuit [48 F.3d 376 (Dec. 1994)].

b. Decision and Order substituted for vacated decision (vacated decision 16 F.3d 348 - Feb. 1994).

UNITED STATES of America, Plaintiff-Appellee,
v.
Ross **HUEBNER**, Defendant-Appellant,

UNITED STATES of America, Plaintiff-Appellee,
v.
John **WILLIAMS**, Defendant-Appellant.

Nos. 92-10543, 92-10577.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted June 16, 1993.
Decided Dec. 16, 1994.

One defendant was convicted in the United States District Court for the District of Nevada, Philip M. Pro, District Judge, of 12 counts of aiding and abetting taxpayers and attempted evasion of payment of their income taxes for previous years, and defendant and another defendant were convicted of conspiracy to commit attempted evasion offense and to defraud United States by obstructing collection of income taxes. Defendants appealed. The Court of Appeals held that: (1) bankruptcy

filings and accompanying falsifications, combined with defendants' wilful intent, constituted offense of evasion of payment of income taxes; (2) defendants' convictions for conspiracy to defraud United States by obstructing collection of income taxes was supported by evidence; and (3) refusal to submit special verdict which would show whether jury found conspiracy to evade income taxes or conspiracy to defraud United State was not abuse of discretion.

Affirmed.

Opinion, 16 F.3d 348, superseded.

John G. Watkins, and Susan N. Wasko, Las Vegas, NV, for defendant-appellants.

Robert E. Lindsay, Alan Hechtkopf, & Karen Quesnel, U.S. Dept. of Justice, Tax Div., Washington, DC, and Karen Moss & Steven Ward, Las Vegas, NV, for plaintiff-appellee.

Appeals from the United States District Court for the District of Nevada.

Before: FAIRCHILD,** BEEZER and WIGGINS, Circuit Judges.

ORDER

The opinion filed February 10, 1994 and published at 16 F.3d 348 is withdrawn and the attached per curiam opinion is filed in its place. With the opinion withdrawn, the petitions for rehearing with suggestions for rehearing en banc are moot. The parties may file a renewal of the petition for rehearing with suggestion for rehearing in banc upon the filing of a new decision by the court.

OPINION

PER CURIAM:

OVERVIEW

Ross Huebner was convicted of twelve counts of aiding and abetting taxpayers in the attempted evasion of payment of their income

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** Honorable Thomas E. Fairchild, Senior Circuit Judge, Seventh Circuit, sitting by designation.

taxes for various years. 18 U.S.C. §2; 26 U.S.C.§7201*** Huebner and John Williams were also convicted of conspiracy to commit the attempted evasion offense and to defraud the United States by obstructing collection of income taxes. 18 U.S.C. §371.

These convictions arose out of the participation of Huebner and Williams in the activities of John Freeman in assisting numerous taxpayers)(actually tax protesters)

*** In each count, Huebner was charged with aiding and abetting one taxpayer in the attempted evasion of payment of his income tax for a particular calendar year. In every count relating to one taxpayer, the affirmative attempt consisted of the same single filing by that taxpayer of a false and fraudulent voluntary petition for bankruptcy. As to taxpayer Sproles, there were separate counts for his tax due for 1979, 1980, and 1981; as to Taylor, for 1981, 1982, 1983, 1984, and 1985; as to the Barnes, for 1982, 1983, 1984, and 1985.

We perceive a serious question whether a single filing in bankruptcy could be deemed several distinct offenses of attempted evasion--one for each calendar year. Defendant Huebner, however, has not raised this question, nor has the government addressed it. We do not decide it. The only cumulative consequences here of conviction of twelve distinct offenses is the imposition of twelve $50 special assessments.

whose income taxes the IRS was trying to collect by levying on wages. Freeman was also indicted, but was found incompetent to stand trial. The pattern, probably devised by Freeman, was typically as follows:

When a person, whom we will refer to as "taxpayer" although usually more accurately described as a non-taxpayer, would bring Freeman an IRS notice of levy on his wages, Freeman would tell the taxpayer that he should file in bankruptcy because that would stop the levy. Freeman would supply petition forms which the taxpayer would fill out and sign. Freeman would have the taxpayer sign a backdated promissory note to Constitutional Sulphur (apparently Freeman). this would appear to establish a debt of many thousands of dollars, and require substantial monthly payments. Freeman specified the amount, large enough so that if paid the taxpayer's income would be largely or wholly absorbed. This indebtedness, which was clearly sham, and the

payments, were shown on the bankruptcy forms. Huebner would prepare the notes for the taxpayer's signature and Freeman would give "receipts" for previous payments, which had not been made, and promise to give receipts for future payments, also not actually to be made. He assured the taxpayers he would not collect the notes. Williams would usually sign the note as witness, and take the petition to court and file it.

Upon filing, the IRS would be notified, and because of the automatic stay (11 USC §523(a)(1)) the IRS would immediately release the levy. The stay would remain in effect, unless lifted, until dismissal or other termination of the bankruptcy case or other event specified by statute. Most, if not all, the tax obligations involved in this case would not be dischargeable in bankruptcy. 11 USC §523(a)(1). The maneuver engineered by Freeman, with the participation of Huebner and Williams, would temporarily stall the process

of collection by levy or other proceeding.

While the stay remained in effect, taxpayers would receive their wages in full (except for normal withholding). Had they not obtained the stay and release, they would have received only portion exempt from levy [$75.00/wk], and the balance would have been paid to the IRS to apply on their taxes. Thus the stay deprived the IRS of payment of those balances.

DISCUSSION

I. Attempt to Evade or Defeat Payment of Tax.

26 USC §7201 provides that '[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by the title or the payment thereof shall ... be guilty of a felony..."

We are not concerned in this case with an attempt to evade or defeat determination of liability for tax, but rather with an attempt to evade or defeat payment. It has been recognized that violation of §7201 "includes

the offense of willfully attempting to evade or defeat the *assessment* of a tax as well as the offense of willfully attempting to defeat the *payment* of a tax." *Sansone v. United States*, , and decisions there cited.

As defendant Huebner correctly argues, the filing of a petition in bankruptcy will not affect the liability of Sproles, Taylor, and Barnes for the income taxes involved here. The indictment charges Huebner with willfully aiding, abetting, advising and counselling Sproles and the other in "the attempt evasion of the payment of the income tax..." Although the act of filing the petition was not an attempt to conceal income or otherwise escape liability for tax, it did put beyond the reach of the IRS a portion of the taxpayers' wages during the period the stay remained in effect. The question is whether this act was punishable as an attempt to evade or escape payment.

On June 23, 1986, Sproles filed a voluntary individual petition for relief under Chapter 7.

an accompanying schedule showed total monthly income of $850 and total monthly expenses of $1,650, of which $1,000 was payable to Constitutional Sulphur. The unsecured claim of Constitutional Sulphur was shown as $120,000. The bankruptcy case was dismissed July 25, 1986.

On September 18, 1986, Taylor filed a voluntary individual petition for relief under Chapter 11. An accompanying schedule showed total monthly expenses of $2,930.76, of which $800 was payable to Constitutional Sulphur. The unsecured claim of Constitutional Sulphur was shown as $96,000. On October 23, 1986, constitutional Sulphur accepted as a member of the Committee of Unsecured Creditors. The bankruptcy case was dismissed May 5, 1987.

On July 18, 1985, Richard and Lillian Barnes filed a voluntary joint petition for relief under Chapter 11. An accompanying schedule showed total monthly income of $2,430.60 and total monthly expenses of $2,531.39, of which

$1,000 was payable to Constitutional Sulphur. The unsecured claim of Constitutional Sulphur was shown as $130,000. The bankruptcy case was dismissed May 5, 1987. The Barneses also filed a voluntary joint petition October 22, 1986, with similar showing except for monthly income of $600 and expenses of $2,597.24. The bankruptcy case was dismissed December 10, 1987. Constitutional Sulphur was a member of the Creditors' Committee.

The evidence suggests that Freeman believed and told his clients that it would be necessary to show substantial debt and an excess of monthly expenses over income in order to file a valid bankruptcy petition. Undercover Agent Edwards (posing as a taxpayer subject to a levy) testified that Freeman advised him to go bankrupt:

> [Answer:] Mr. Freeman said that it didn't matter how much money I was making, that he would have me sign a promissory note to Constitutional Sulphur which would put me in debt and cover it, it should make it okay.
> [Question:] Cover what?
> [Answer:] The fact that I was going

bankrupt.

June 8, 1992 Tr. at 65. Freeman told Edwards of the notes to Constitutional Sulphur of other individuals who had gone bankrupt. "Mr. Freeman indicated that these notes were the basis of for the bankruptcy." *Id.* at 68.

[1] The Bankruptcy Act does not require any particular degree of financial distress as a condition precedent to a petition seeking relief. One of the difficulties in this case is that filing of petitions that did not contain the false assertions of debt and excess of expenses over income, contained in the petitions now involved , would also have triggered the automatic stay and release of levy.

At trial, the government conceded "there's nothing wrong with filing a bankruptcy petition in order to get a levy lifted." June 18, 1992 Tr. at 44-45. IRS Revenue Officer Fite, a member of the Special Procedures Branch, testified that the Constitutional Sulphur

indebtedness was not necessary for the bankruptcy petitions to be filed. Thus had the petitioners omitted the false assertions of debt and required monthly payments to Constitutional Sulphur, the automatic stay would have gone into effect, and the levies released, but the filing would not constitute an unlawful attempt to evade payment of tax. It is entirely clear that taxpayers had not chosen bankruptcy as a proceeding in which to establish that they did not owe the taxes involved.

If the conviction can be sustained in this case, it must be because the false assertions added something to the purpose of the attempt, substantial enough to make it criminal. We conclude that the conviction can be upheld on that basis.

The false assertions of heavy debt and financial distress must have been made with a purpose. Perhaps Huebner and the filers labored under the belief that the petition

could not legally be filed, or might be readily dismissed, unless debt and financial distress were shown. Or perhaps they thought that it would be important to make resort to bankruptcy seem more plausible. Perhaps they supposed that showing of distress would make less likely a dismissal of a Chapter 7 case for substantial abuse of the provisions of that Chapter (11 USC §707(b)), or the IRS would be more willing to suspend collection for hardship, or less likely to seek a lifting of the automatic stay.

In any event, the purpose of the assertions must have been thought important. The taxpayers not only lied about the facts, but they and Freeman and Huebner went to some trouble to fabricate documentary support.

[2] Although the extent to which these false assertions increased the success of the maneuver, i.e., the amount of which the IRS was deprived, may be difficult to assess, it is the "willful and positive attempt to evade tax in any manner or to defeat it by any means" which

constitutes the offense, rather than the success or consummation of the scheme. ***Spies v. United States***, 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418 (1943).

Defendant Huebner relies on this court's statement in *Edwards v. United States*:

> Evasion and defeat, as we understand their use in this section [§7201], contemplate an escape from tax and not merely a postponement of disclosure or payment... [The evasion] focuses on the accused's intent to deprive the Government of its tax moneys, and this requires more than just delay.

375 F.2d 862, 867 (9th Cir. 1967) (footnotes omitted).

The statement in *Edwards* must be read in the light of the facts of that case, which are significantly different from those now before us. Defendant Edwards was a tax attorney who prepared returns for client taxpayers who supplied him with funds with which to pay their taxes. He deposited these funds in a trust account, from which at times he withdrew money for personal purposes. "Appellant's troubles with his trust account led him to prepare tax

returns, collect the amount of the tax due and then fail to file the return or make the payment." Id. at 865. The court noted that Edwards had obtained six month extensions "for a number of the returns cited in the indictment. He thereby disclosed to the Government that as to those taxpayers as a return was due." *Id.* at 867.

The *Edwards* court went on:

> It thus appears that appellant's purpose was to take advantage of the time lag in Government investigation of delinquent returns to tide him over during a period of personal financial hardship. Nothing in the record would suggest that he ever intended the permanent evasion of any of his client's taxes.
> One pursing a path such as that of the appellant might eventually fall so far behind that no reasonable man could believe that he would ever catch up. It does not appear, however, that appellant's straits had become that serious.
> *Id.* at 867.

[3] Here, as in *Edwards*, there is evidence that the defendants attempted to evade the payment of taxes. The distinguishing factor is that in *Edwards*, there was insufficient

evidence of any willfulness on the part of the tax preparer permanently to evade payment. In the case before us, however, the evidence is strong that these taxpayers do not intend voluntarily to pay their tax obligations. Their purpose was to deprive the IRS of the amounts of money collectible under the levies for as long as they could.

The "delay" to which the *Edwards* court referred was a postponement or delay in payment, consistent with an intent ultimately to make payment. The taxpayers in the present case obstructed the IRS collection effects with the purpose of permanently depriving the IRS of the money which it would have collected if it had not been forced to release its levy, and without any suggestion that they intended to make voluntary payment eventually.

Edwards did not distinguish between evasion of determination of tax liability and evasion of payment, and defendant there was delaying both. In *United States v. DeTar*, 832 F.2d 1110

(9th Cir. 1987), the taxpayer had filed income tax returns, reporting a substantial amount due, but paid only a nominal portion. He placed assets in the names of nominees and beyond the reach of process. He dealt primarily in cash. The likely effect of his conduct would be to conceal assets and avoid collection. He was convicted of willfully attempting to evade and defeat payment of tax in violation of §7201. We reversed on grounds that the judge should have instructed the jury regarding a lesser included offense. We did emphasize, however, that there was sufficient evidence to support a conviction of a violation of §7201. The case now before us does not involve concealment of assets, but does involve placing particular funds beyond the reach of the IRS levy. The amounts protected from collection are probably much larger in *DeTar*, but on principle, *DeTar* supports the convictions for evasion of payments by compelling the release of the levies here.

II. Conspiracy to Defraud the United States

Count One of the indictment charged Huebner and Williams, along with Freeman and several taxpayers whose cases were served, with conspiracy in violation of 18 USC 371. That section punishes for conspiracy "either to commit any offense against he United States, or to defraud the United States, or any agency thereof in any manner or for any purpose..." Count One charged a conspiracy both (1) to commit an offense (evasion of payment of income taxes in violation of 26 USC §7201) and (2) to defraud the United States by impeding, impairing, obstructing, and defeating the lawful government function of the IRS in the collection of income taxes.

We have decided in Part I of this opinion that the bankruptcy filings and accompanying falsifications, combined with the defendant's willful intent, could be found to constitute the offense of' evasion of payment of tax in 26 USC §7201. The question is close, however, and

if we were to be found wrong, the question would arise whether the agreement proved, to make these filings in order to obstruct collection, could be found to be a conspiracy to defraud the United States in the manner charged. We conclude that it could.

Although this branch of §371 speaks of a purpose "to defraud the United States...," the statute "reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" *Dennis v. United States*, 284 U.S. 855, 861, 86 S.Ct. 1840, 1844, 16 L.Ed.2d 973 (1966)(citations omitted); see *United States v. Little*, 753 F.2d 1420, 1443 (9th Cir.1984) (conspiracy to obstruct collection of income taxes punishable under §371); accord. *United States v. Jerkins*, 871 F.2d 598, 602 (6th Cir. 1989); *United States v. Rosengarten*, 857 F.2d 76, 79 (2d Cir. 1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989). There must, however, be an agreement

to obstruct by "deceit, craft or trickery, or at least by means that are dishonest." *United States v. Caldwell*, 989 F.2d 19056, 1058-59 (9th Cir.1993) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924)).

[4] The filing of a bankruptcy petition by one who owes income tax, causing the automatic stay to arise, surely obstructs, for a time, the collection of the tax. Nevertheless, one who files in order to seek the protection which the Bankruptcy code is really intended to provide, would scarcely be charged with the purpose to defraud the United States. Perhaps it could be argued that a filing for the sole purpose of obstructing the collection of income taxes which are not dischargeable and are no longer subject to challenge, as the jury could find in this case, is sufficiently "dishonest" so that there is a purpose "to defraud". The government did not try the case on that theory nor argue it on appeal, and we do not decide

that question. In this case, however, it was also charged and proved that fraudulent promissory notes were prepared and signed and that the statements were false in listing the spurious debt and required monthly payments to Constitutional Sulphur, so that the taxpayer-petitioners' total monthly expenses would approximate or exceed total monthly income.

Thus the question would become whether the false assertion of debt and payments to Constitutional Sulphur supplied the element of dishonesty required for a conspiracy to defraud even if the intent to sue the automatic stay to obstruct collection, without more, did not. We think it did, for the following reasons.

The false assertion created a deceitful appearance of financial hardship and a readily understandable reason for seeking the protection of bankruptcy. The automatic stay, although it could be lifted earlier, would terminate if the bankruptcy case were dismissed. The facts falsely asserted would

tend to render less likely a dismissal of a Chapter 7 case for substantial abuse of the provision of that chapter (§707(b)). There was testimony that the IRS may settle a claim in return for a promise of installment payments, based on ability to pay, and may suspend collection where hardship is shown. The facts falsely claimed might affect the IRS' willingness to suspend collection or settle its claim.

Therefore, the convictions of conspiracy to defraud the United States could be sustained even if the object of the conspiracy did not amount to an offense against the United States.

III. Other Defense Arguments

A. Claim of Change of Theory During Trial.

Huebner contends that he was tried and convicted on theories not alleged in the indictment. We are satisfied, however, that the government's theory at trial was consistent with the charges, and are unpersuaded by his

argument that conviction was the product of confusion.

B. Motion for Mistrial

[5] Huebner, Williams and five taxpayers were originally brought to trail. Each taxpayer was charged with conspiracy in Count One and with several counts of attempted tax evasion. Much of the evidence relevant to each taxpayer was not relevant to the other four unless and until a single conspiracy involving all was established. During the trial, the court granted severance to the five taxpayers. The situation was somewhat different as to Huebner and Williams because of their continuing involvement with Freeman and the taxpayers.

Huebner now argues that the court erred in denying him a mistrial after severance of the others.

The court instructed the jury that evidence admitted solely as to one of the severed

defendants should not be considered against Huebner or Williams unless there was later, different instruction. Much of the evidence was, different instruction. Much of the evidence was, in fact, relevant to the charges against Huebner, and he has not demonstrated which evidence was prejudicial to him. The denial of mistrial was not an abuse of discretion.

C. Juror Requests for Evidence.

[6] Judge Pro permitted the jurors to pass up notes requesting evidence on particular points. He would inform counsel of the request. Huebner argues that this practice prejudiced him because "it allowed the prosecutor to become a friend of the jurors, and ...it allowed the jury to participate in the production of evidence (acting like attorneys)." Huebner Br. at 17.

The procedure was entirely neutral, and Huebner does not point out prejudice resulting

from any of the few questions asked. There was not error or abuse of discretion. See *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970); *United States v. Callahan*, 588 F.2d 1078, 1086, (5th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979).

D. Special Verdict.

Both defendants argue that it was error not to submit a special verdict which would show whether the jury found a conspiracy to evade income tax or a conspiracy to defraud the United States. We find no abuse of discretion.

Generally, "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive ... the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420, 90 S.Ct. 642, 654, 24 L.Ed.2d 610 (1970); *United States v. Outpost Dev. Co.*, 552 F.2d 868, 869-70 (9th Cir.), *cert. denied*, 434 U.S. 965, 98 S.Ct. 503, 54 L.Ed.2d 450 (1977); *Griffin v. United States*,

502 U.S. 46, 49, 112 S.Ct. 466, 469, 116 L.Ed.2d 371 (1991) (general jury verdict valid so long as legally supportable on one of the submitted grounds-- even though no assurance that a valid ground, rather than an invalid one, was actual basis for a jury's action).

We have recognized an exception to the general rule where there has been a conviction of a conspiracy to commit two or more offense and a conviction on a substantive count charging one of the offenses

> is overturned on appeal for failure to state a crime. If the jury, when considering the conspiracy count, focused only on the crime embodied in the subsequently over-turned substantive crime conviction the conspiracy conviction also should be overturned. Of course, if it focused on other crimes as well, the conspiracy conviction should be sustained. The one-is-enough charge makes it impossible to know precisely what the jury considered. Not knowing, a reviewing court must overturn the conspiracy conviction.

United States v. Carman, 577 F.2d 556, 567-68 (9th Cir. 1978). This exception would be significant only if we are in error in

concluding that Huebner's conviction of aiding and abetting attempted evasion of payment of tax can be sustained.

In *Carman*, the indictment charged, and the jury convicted on a number of substantive counts, ranging from the interstate transportation of money, to bribery, and securities fraud. The indictment also charged and the jury convicted of conspiracy to commit each of the offenses charged in the substantive counts. On appeal, we decided that 18 USC §2314 did not reach the conduct contemplated in the count charging the interstate transportation offense. As stated, it was impossible to know whether the jury found only an agreement to engage in conduct which was not an offense, and therefore, not an unlawful conspiracy.

[7] The case before us is readily distinguishable from *Carman*. There was ample proof that Huebner and Williams conspired with Freeman and other to bring about the filing of

the false bankruptcy petitions in order to cause the automatic stay and temporarily stall the process of collection by the IRS. The jury must have found that purpose in order to find defendants guilty on the conspiracy count (as well as to find Huebner guilty on the substantive counts).

Under the facts in this case, it would not have been possible for the jury to have found a conspiracy to aid and abet attempted evasion without also finding a conspiracy to defraud the United States by obstructing collection. The purpose of the defendants' agreement, which the jury must have found, was to make the false filings in order to trigger the automatic stay and thus stall the process of collection of tax. Unlike the situation in Carman, there could be no danger that the jurors based their conspiracy verdict on finding that the object was to aid and abet attempted evasion without also finding that the object was to defraud the United States by obstructing collection.

E. Motion for Disclosure of Exculpatory Evidence.

After the commencement of trial, Huebner's counsel filed a motion entitled "Motion for Disclosure of Exculpatory Evidence (Rule 16)." It stated that it was filed under the authority of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and contained 35 numbered requests , some with subdivision. The second of 19 subdivisions of paragraph 20 requested "All Documents maintained in the system of record known as Individual Master File (IMF) Treasury/IRS 24.030, which pertained to the Defendant[.]"

[8] The district court denied his motion without prejudice. The IMF was written in code, with numbers standing for events and procedures. Huebner contends that the district court's denial prevented him from effectively cross-examining a prosecution witness as to the accuracy of the IMF and its contents. He states that his counsel was unable to translate

the document and was unaware of its evidentiary significance until trial, and that counsel would not possibly have known that the prosecution would make use of it. Huebner also contends that the court's ruling deprived him of his right to exculpatory evidence under Brady.

In response, the government states that, prior to trial, defense counsel had access to documents which translated the IMF into a readable form, as well as access to Certified Certificates of Assessment and Payments, which had been prepared from the IMF and contained translations of its relevant information. Counsel's brief, although asserting generally that he had found inconsistencies in the IMF so great that the IMF document is literally fraudulent, and a "a fraud, a shame, a red herring," contains no demonstration of unfair prejudice nor that any information would have been exculpatory, so as to invoke *Brady*.

We find no error.

F. Sufficiency of the Evidence.

Examination of the record has satisfied us that there was ample evidence to support the jury verdict.

The convictions and sentences are **AFFIRMED**.

i. Decision of the United States Court of Appeals for the Ninth Circuit [48 F.3d 376 (Dec. 1994)].

c. Decision and Order, originally issued by the Court of Appeals and vacated upon the filing of first request for rehearing en banc by Appellant Huebner.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Ross **HUEBNER**, Defendant-Appellant.

UNITED STATES of America,

Plaintiff-Appellee,

v.

John **WILLIAMS**, Defendant-Appellant.

Nos. 92-10543, 92-10577.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted June 16, 1993.
Decided Feb. 10, 1994.

One defendant was convicted of ten counts of aiding and abetting three people in attempted evasion of payment of income taxes, and that defendant and another defendant were convicted

of conspiracy to commit attempted evasion offense and to defraud United States by obstructing collection of income taxes, in the United States District Court for the District of Nevada, Philip M. Pro, J., and defendants appealed. The Court of Appeals, Fairchild, Senior Circuit Judge, sitting by designation, held that: (1) filing of bankruptcy petition for the purpose of causing Internal Revenue Service (IRS) levy on wages to be released could not constitute attempt to evade or defeat income tax or payment thereof, and (2) conspiracy to cause release of IRS levy on tax protesters' wages by having them file bankruptcy petitions containing false statements of indebtedness could constitute conspiracy to defraud IRS by obstruction its collection of income taxes.

Affirmed in part, reversed in part, and vacated in part.

Wiggins, Circuit Judge, filed opinion dissenting in part and concurring in part.

John G. Watkins, Las Vegas, Nevada, and Susan N. Wasko, Las Vegas, Nevada, for the defendants-appellants.

Robert E. Lindsay, Alan Hechtkopf and Karen Quesnel, United States Department of Justice, Tax Division, Washington, D.C., and Karen Moss and Steven Ward, Las Vegas, Nevada, for the District of Nevada.

Before: FAIRCHILD,**** BEEZER and WIGGINS, Circuit Judges.

FAIRCHILD, Senior Circuit Judge:

OVERVIEW

Ross Huebner was convicted of ten counts of aiding and abetting three people in the attempted evasion of payment of their income taxes for various years, 18 USC §2, 26 USC §7201. Huebner and John Williams were also convicted of conspiracy to commit the attempted evasion offense and to defraud the United States by obstructing collection of income

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**** Honorable Thomas E. Fairchild, Senior Circuit Judge, Seventh Circuit, sitting by designation.

taxes. 18 USC §371.

The principal issues are (1) whether the filing of a petition in bankruptcy for the purpose of causing an IRS levy on one's wages to be released can constitute an attempt to evade or defeat one's income tax or the payment thereof under 26 USC §7201, and (2) whether a conspiracy to cause the release of an IRS levy on people's wages by having them file petitions in bankruptcy containing false statements of indebtedness can constitute a conspiracy to defraud the IRS by obstructing its collection of income taxes owed by those people, under 18 USC §371.

These convictions arose out of the participation of Huebner and Williams in the activity of John Freeman in assisting Numerous taxpayers (tax protesters) whose income taxes the IRS was trying to collect. Freeman was also indicted, but was found incompetent to stand trial. The pattern, probably devised by Freeman, was typically as follows:

When a person, whom we will refer to as "taxpayer" although usually more accurately described as a non-taxpayer, would bring Freeman an IRS notice of levy on his wages, Freeman would tell the taxpayer that he should file in bankruptcy because that would stop the levy. Freeman would supply petition forms which the taxpayer would fill out and sign. Freeman would have the taxpayer sign a backdated promissory note to Constitutional Sulphur (apparently Freeman). This would appear to establish a debt of many thousands of dollars, and require substantial monthly interest payments. Freeman specified the amount, large enough so that if paid the taxpayer's income would be largely or wholly absorbed. This indebtedness, which was clearly sham, and the interest payments, were shown on the bankruptcy forms. Huebner would prepare the notes for the taxpayer's signature and Freeman would give "receipts" for previous payments, which had not been made, and promise

to give receipts for future payments, also not actually to be made. He assured the taxpayers he would not collect the notes. Williams would usually sign the note as witness, and take the petition to court and file it.

Upon filing, the IRS would be notified, and because of the automatic stay (11 USC §362(a)) the IRS would immediately release the levy. The stay would remain in effect, unless lifted, until dismissal or other termination of the bankruptcy proceeding or other event specified by statute. Most, if not all, the tax obligations involved in this case would not be dischargeable in bankruptcy. 11 USC §523(a)(1). The maneuver engineered by Freeman, with the participation of Huebner and Williams, would temporarily stall the process of collection by levy or other proceeding.

DISCUSSION

I. Attempted tax Evasion

[1] Defendants correctly argue that filing of a petition in bankruptcy will not result in

wiping out liability for the income taxes involved here. The filing causes the release of the levy, and impedes for some period of time the process of collection. It will not lead to discharge of the debt.

The government does not really argue to the contrary. It points to the possibility that the taxpayers could repeatedly file bankruptcy petitions and thus ultimately avoid payment, and to a suggestion Williams made to an undercover agent, posing as a taxpayer, that he could repeatedly file bankruptcy petitions. Noting conduct by the taxpayers in this case such as failures to file returns and filing false withholding certificates as well as the long periods over which their past due taxes remained unpaid, counsel argued that "the jury could reasonably find that the filing of the false bankruptcy petitions was intended as a means of evading the payment of taxes, not merely postponing payment." Government Brief, Huebner, pp. 24-25. Thus a bankruptcy filing

could constitute, under 26 USC §7201, an attempt to evade or defeat a tax or payment thereof, if the jury found that the taxpayer intended to engage in repeated filings of similar resistance to collection in the future.

[2] We do not agree. The indictment contains no suggestion that filings would be repeated. Indeed, it charges that "[t]hese petitions had the effect of immediately stopping all collection activity by the IRS and, therefore, evading and defeating the payment of income tax owed to the United States of America." Each count charging the aiding and abetting of evasion alleged that it was accomplished "by aiding, abetting, advising, and counseling...[taxpayers] to make, sign, and file...a false and fraudulent Voluntary Petition for bankruptcy...," without alleging any intent as to future conduct on the part of either the defendant or the taxpayer. In any event, we do not view the possibility of

repetition of the process plus the evidence of the taxpayers' antipathy to payment as sufficient evidence to turn an act which caused temporary delay in collection into an attempt to evade or defeat the tax under the statute.

Section 7201 provides that "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall ...be guilty of a felony...." The government would construe "evade or defeat...payment" as including "temporarily obstruct" collection. In *Edwards v. United States*, 375 F.2d 862, 867 (9th Cir.1967), we held that "[e]vasion and defeat, as we understand their use in this section, contemplate an escape from tax and not merely a postponement of disclosure or payment.... [The evasion] focuses on the accused's intent to deprive the Government of its tax moneys, and this requires more than just delay." (Footnote omitted.) In an earlier case, we had

used the language, "Tax evasion may include attempts not only to block prosecution of the taxpayers but to block collection of the tax." *Forman v. United States*, 261 F.2d 181, 183 (9th cir.1958), *judgment aff'd*, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960). The Forman court was dealing with a distinction, for application of the statute of limitations, between acts of concealment intended to block prosecution of taxpayers for tax evasion and acts of concealment intended to block prosecution of taxpayers for tax evasion and acts of concealment intended to block prosecution of conspirators and conspiracy. It is clear from the context that the use of the phrase "block collection of the tax". has no significance on the matter of temporary obstruction in the present case.

[3] In *United States v. DeTar*, 832 F.2d 1110 (9th Cir.1987), the taxpayer had filed income tax returns, reporting a substantial amount due, but paid only a nominal portion. He

placed assets in the names of nominees and beyond the reach of process. He dealt primarily in cash. The likely effect of his conduct would be to conceal assets and avoid collection. He was convicted of willfully attempting to evade and defeat payment of tax in violation of §7201. This court held that the intent to evade or defeat the tax or its payment could be inferred from his conduct. The evidence was deemed sufficient to support a conviction. *Id.* at 1114. Thus *DeTar* stands for the proposition that one who willingly attempts to escape tax by making the §7201 offense.

[4,5] The difference between the *DeTar* and the case before us is that in DeTar, concealment of assets could defeat tax by wholly defeating collection, and an intent to do so could be inferred. Filing of a bankruptcy petition would temporarily obstruct collection, but could not possibly wipe out the tax obligation nor permanently prevent

collection. Conduct that could accomplish an escape from the tax need not be successful in order to violate §7201, since that offense consists of an attempt. We think, however, that conduct that could not possibly result in escape cannot amount to an attempt to evade or defeat the tax, nor be a basis for an inference of an intent to do so.

[6] The bankruptcy filings produced delay, but would not defeat, or result in escape from, the tax. Therefore, Huebner's convictions of aiding and abetting attempted tax evasion must be reversed.

II. Conspiracy to Defraud the United States

Count One of the indictment charged Huebner and Williams, along with Freeman, and several taxpayers whose cases were severed, with conspiracy in violation of 18 USC §371. That section punishes for conspiracy "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose..."

Count One charged a conspiracy both (1) to commit an offense (evasion of payment of income taxes in violation of 26 USC §7201) and (2) to defraud the United States by impeding, impairing, obstructing, and defeating the lawful governmental function of the Internal Revenue Service in the collection of income taxes.

[7] We have decided in Part I of this opinion that the bankruptcy filing did not constitute the offense of evasion in 26 USC §7201. We now deal with the question whether these filings could be found to defraud the United States in the manner charged. We conclude that they could.

Although this branch of §371 speaks of a purpose "to defraud the United States...," the statute "reaches 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government,'" *Dennis v. United States*, 384 U.S. 855, 861, 86 S.Ct. 1840, 1844, 16 L.Ed.2d 973

(1966) (citations omitted). See *United States v. Little*, 753 F.2d 1420, 1443 (9th Cir.1984) (conspiracy to obstruct collection of income taxes punishable under §371); accord *United States v. Jerkins*, 871 F.2d 598, 602 (6th Cir.1989); *United States v. Rosengarten*, 857 F.2d 76, 79 (2d Cir.1988), *cert. denied*, 488 U.S. 1011, 109 S.Ct. 799, 102 L.Ed.2d 790 (1989). There must, however, be an agreement to obstruct by "deceit, craft or trickery, or at least by means that are dishonest." *United States v. Caldwell*, 989 F.2d 1056, 1059 (9th Cir. 1993) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924)).

[8] The filing of a bankruptcy petition by one who owes income tax, causing the automatic stay to arise, surely obstructs, for a time, the collection of the tax. Nevertheless, one who files in order to seek the protection which the Bankruptcy Code is really intended to provide, would scarcely be charged with the

purpose to defraud the United States. Perhaps it could be argued that a filing for the sole purpose of obstruction the collection of income taxes which are not dischargeable and are no longer subject to challenge, as the jury could find in this case, is sufficiently "dishonest" so that there is a purpose "to defraud." The government did not try the case on that theory nor argue it on appeal, and we do not decide that question. In this case, however, it was also charged and proved that fraudulent promissory notes were prepared and signed and that the petitions were false in listing the spurious debt required monthly payments to Constitutional Sulphur, so that the taxpayer-petitioners' total monthly expenses would approximate or exceed total monthly income. Defendants argued mainly that the filing of a bankruptcy petition containing the false assertions was not an attempted evasion. "At best, it would be bankruptcy fraud not income tax evasion." Huebner Brief at 4. It

seems fair, however, to consider (though not directly argued) whether the false assertion of debt and payments to Constitutional Sulphur supplied the element of dishonesty required for a conspiracy to defraud even if the intent to use the automatic stay to obstruct collection, without more, did not. We think it did, for the following reasons.

The assertion created a deceitful appearance of financial hardship and a readily understandable reason for seeking the protection of bankruptcy. The automatic stay, although it could be lifted earlier, would terminated if the preceding were dismissed. The facts falsely asserted would tend to render less likely a dismissal of a Chapter 7 case for substantial abuse of the provisions of that chapter (§707(b)). There was testimony that the IRS may settle a claim in return for a promise of installment payments, based on ability to pay, and may suspend collection where hardship is shown. If the facts falsely

claimed were true, they might affect the IRS' willingness to suspend collection or settle its claim.

III. Other Defense Arguments

A. Claim of Change of Theory During Trial

Huebner's contention that he was tried and convicted on theories not alleged in the indictment is largely directed at the counts charging aiding and abetting attempted evasion. To that extent the conclusion is moot. In any event, we are satisfied that the government's theory at trial was consistent with the charges set out in Count One, the conspiracy count, of the indictment.

B. Juror Confusion

Huebner argues that because of the alleged change in the government's theory the jury's findings based on evasion of income taxes were the product of confusion, caused by the government. This argument is also moot.

C. Motion for Mistrial

[9] Huebner, Williams and five taxpayers

were originally brought to trial. Each taxpayer was charged with conspiracy in Count One and with several counts of attempted tax evasion. Much of the evidence relevant to each taxpayer was not relevant to the other four unless and until a single conspiracy involving all was established. During the trial, the court granted severance to the five taxpayers. The situation was somewhat different as to Huebner and Williams because of their continuing involvement with Freeman and the taxpayers.

Huebner now argues that the court erred in denying him a mistrial after severance of the others.

The court instructed the jury that evidence admitted solely as to one of the severed defendants should not be considered against Huebner and Williams unless there was a later, different instruction. Much of the evidence was, in fact, relevant to the charges against Huebner, and he has not demonstrated which

evidence was prejudicial to him. The denial of a mistrial was not an abuse of discretion.

D. Juror Requests for Evidence

[10] Judge Pro permitted the jurors to pass up notes requesting evidence on particular points. He would inform counsel of the request. Huebner argues that this practice prejudiced him because 'it allowed the prosecutor to become a friend of the jurors, and ... it allowed the jury to participate in the production of evidence (acting like attorneys)." Huebner Brief at 17.

The procedure was entirely neutral, and Huebner does not point out prejudice resulting from any of the few questions asked. There was no error or abuse of discretion. See *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir.1970); *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979).

E. Special Verdict

[11] Both defendants argue that it was error

not to submit a special verdict which would show whether the jury found a conspiracy to evade income taxes of a conspiracy to defraud the United States. We find an abuse of discretion.

Generally. "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive ... the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 90 S.Ct. 642, 654 24 L.Ed.2d 610 (1970); *United States v. Outpost Dev. Co.*, 552 F.2d 868, 869 (9th Cir.), *cert. denied*, 434 U.S. 965, 98 S.Ct. 503, 54 L.Ed.2d 450 (1977); *Griffin v. United States*. 502 U.S.46, ___, 112 S.Ct. 466, 469 116 L.Ed.2d 371 (1991) (general jury verdict valid so long as legally supportable on one of the submitted grounds-even though no assurance that a valid one, was actual basis for a jury's action).

F. Motion for Disclosure of Exculpatory Evidence

[12] After the commencement of trial, Huebner's counsel filed a motion entitled "Motion for Disclosure of Exculpatory Evidence (Rule 16)." It stated that it was filed under the authority of *Brady v. Maryland*, 373 U.S. 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963), and contained 35 numbered requests, some with subdivisions. The second of 19 subdivisions of paragraph 20 requested 'All Documents maintained in the system of records known as Individual master File (IMF) Treasury/IRS 24.030, which pertain to the Defendant."

The district court denied his motion without prejudice. The IMF was written in code, with numbers standing for events and procedures. Huebner contends that the district court's denial prevented him from effectively cross-examining a prosecution witness as to the accuracy of the IMF file and its contents. He states that his counsel was unable to translate the documents and was unaware of its evidentiary significance until trial, and that

counsel could not possibly have known that the prosecution would make use of it. Huebner also contends that the court's ruling deprived him of his right to exculpatory evidence under *Brady*.

In response, the government states that, prior to trial, defense counsel had access to documents which translated the IMF into a readable form, as well as access to Certificates of Assessments and Payments, which had been prepared from the IMF and contained translations of its relevant information. Counsel's brief although asserting generally that he has found inconsistencies in the IMF so great that the IMF document is "literally" fraudulent, and "a fraud, a shame, a red herring," contains no description of any prejudicial use of the IMF at trial, and no demonstration of unfair prejudice nor that any information would have been exculpatory, so as to evoke *Brady*.

G. Sufficiency of Evidence

[13] Examination of the record has satisfied us that there was ample evidence to support a jury verdict that both defendants were guilty of conspiracy to defraud the government. The evidence of repeated activity of each in carrying out what we have referred to as the Freeman pattern readily supports the inference that they agreed to participant with knowledge of the purpose. Setting out the detail of each piece of evidence would be an unnecessary exercise. Several overt acts were proved.

The conviction of defendant Huebner on the aiding and abetting counts is **REVERSED**, along with the special assessment for those counts. His conviction on Count One (conspiracy) is **AFFIRMED**. His sentence is **VACATED**, and the cause **REVERSED** for resentencing on Count One.

The conviction and sentence of defendant Williams are **AFFIRMED**.

WIGGINS, Circuit Judge, dissenting in part and concurring in part.

I dissent from part 1 of the opinion of the

court. I concur in the balance of the opinion.

The opinion accurately characterizes the 'taxpayers" as "tax protesters". It might have further characterized them as "tax resisters". as well. These "taxpayers" were typically wage earners whose sole income was devised from wages.

The majority disagrees with the district court in its conclusion that Huebner was guilty of count 1, the count alleging an attempt to evade or defeat income tax liability. It points to the fact that a scheme such as that presented here was held in **Edwards v. United States. 375 F.2d 862, 867 (9th Cir.1967)** to be merely a postponement of disclosure or payment, not an intent to deprive the government of its tax revenue.

I think this conclusion is in error. The filing of fraudulent bankruptcy forms had the immediate effect of releasing wages seized by the IRS to the "taxpayer". Such a release

effectively "evaded" the prompt and just payment of the taxes seized. That the tax remains payable is of little present concern: the next effort to collect taxes can be met with similar acts of evasion. In my view Huebner was guilty of attempting to evade the income tax liability of the "taxpayers".

Because the holding today unnecessarily restricts the IRS in its effort to collect taxes from that portion of the public who resist collection, I dissent form part 1 of the opinion.